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**Received - 2021-11-09 04:00:00 PM**  
**Control Number - 51415**  
**ItemNumber - 694**

**PUC DOCKET NO. 51415**  
**SOAH DOCKET NO. 473-21-0538**

<b>APPLICATION OF SOUTHWESTERN ELECTRIC POWER COMPANY FOR AUTHORITY TO CHANGE RATES</b>	<b>§ § §</b>	<b>PUBLIC UTILITY COMMISSION  OF TEXAS</b>
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**SOUTHWESTERN PUBLIC SERVICE COMPANY’S  
AMICUS CURIAE BRIEF ON RATE CASE EXPENSE ISSUES**

Southwestern Public Service Company (“SPS”) hereby files this amicus curiae brief related to the rate case expense (“RCE”) issues addressed by the Proposal for Decision (“PFD”) in this docket. SPS respectfully requests that the Public Utility Commission of Texas (“Commission”) consider the issues discussed in this brief as it considers the PFD.

**I. Introduction**

SPS files this amicus curiae brief because, like other electric utilities in Texas, it has a significant interest in the Commission’s consideration of the \$550 hourly cap on RCEs recommended by the Administrative Law Judges (“ALJs”) in the PFD. This hourly cap has been proposed in other rate cases in recent years. SPS and other electric utilities have opposed the cap in those cases for numerous reasons, including because it is absent from 16 Tex. Admin. Code (“TAC”) § 25.245 (the “RCE Rule”) and is based on outdated, distinguishable, and non-precedential sources.<sup>1</sup> This present proceeding, however, is the first time the Commission will consider the \$550 hourly cap in a contested case. Southwestern Electric Power Company (“SWEPCO”) opposed the \$550 hourly cap throughout the majority of this proceeding, but SWEPCO’s exceptions to the PFD did not address this issue.

SPS has not reviewed all of the evidence presented by SWEPCO and Commission Staff (“Staff”) in this proceeding, but SPS has concerns over any possibility that the Commission’s adoption of the PFD on this issue could result in an “across-the-board” application of the hourly cap to RCEs incurred by electric utilities, which SPS believes is inconsistent with the

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<sup>1</sup> See, e.g., *Application of Southwestern Public Service Company for Authority to Change Rates*, Docket No. 51802, Rebuttal Testimony of Thomas K. Anson at 7–20 (Sept. 15, 2021) (“Anson Rebuttal”).

reasonableness standard in Public Utility Regulatory Act (“PURA”) §§ 36.051 and 36.061(b) and the RCE Rule. The \$550 hourly cap has been a contested issue in SPS’s pending rate case in Docket No. 51802.<sup>2</sup> The Commission’s adoption of this cap will affect not only SWEPCO, but may affect SPS and other electric utilities in this state that are entitled to recover their reasonable RCEs under PURA and the Commission’s rules.

SPS respectfully requests that the Commission consider the broad policy implications of adopting the PFD’s recommendation for the hourly cap. Any decision here that results in a general application of the cap could have far-reaching effects on the ability of electric utilities in Texas to recover their reasonable RCEs or retain the highly-qualified representatives and experts necessary for these specialized, complex proceedings. If the Commission is inclined to adopt the cap with regard to SWEPCO’s RCE recovery, SPS respectfully requests that the Commission’s order not state that the cap should be applied on an across-the-board basis in the Commission’s rate cases. SPS’s request appears to be generally consistent with the ALJs’ recommendation. Any broader, general application of the cap should instead be addressed in a rulemaking where other interested parties can voice their concerns for the Commission’s consideration.

## **II. Discussion**

In the PFD, the ALJs found “that Staff’s proposed \$550 per-hour cap on hourly rates sought for recovery as RCEs in this case is reasonable *and supported by the record in this case*.”<sup>3</sup> The ALJs continued as follows:

The ALJs, however, are not recommending that a hard \$550 per-hour cap should apply in all future cases for two primary reasons. First, at some point in the future, hourly rates in excess of \$550 per hour may not be deemed excessive, and instead might be deemed reasonable, depending on the then-existing circumstances, such as the economy, inflation, or any other number of factors. . . . Second, there may be instances in the near term, not present here, where an electric utility could justify a request to recover in excess of \$550 per hour from its customers.<sup>4</sup>

Again, SPS is not a party to this docket and thus has not reviewed all the evidence on this issue (as the ALJs have), but as a regulated electric utility in Texas, SPS is concerned with any potential imposition of an across-the-board hourly RCE cap in the state’s electric rate cases—particularly

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<sup>2</sup> See generally Docket No. 51802, Anson Rebuttal at 7–20, Direct Testimony of Anna Givens (Sept. 20, 2021). SPS’s rate case is currently abated pending settlement discussions.

<sup>3</sup> PFD at 330 (emphasis added).

<sup>4</sup> *Id.*

given the complex, specialized, and sophisticated litigation required by those proceedings. SPS has addressed this issue at length in its pending rate case, as have other utilities in their proceedings.

*a. Adoption of an Hourly Cap to Recoverable RCEs is Concerning from a Policy Perspective.*

The current RCE Rule, which was adopted in 2014, neither requires nor suggests an hourly rate cap.<sup>5</sup> The rule language upon which the ALJs rely in support of the cap addresses whether evidence shows the RCEs “were extreme or excessive.”<sup>6</sup> However, whether RCEs are extreme or excessive should be based on specific facts and evidence presented in a particular rate case rather than being measured against an arbitrary and outdated \$550 cap. The latter approach is inconsistent with the statutory mandate that utilities be allowed to recover their “reasonable costs” of participating in rate cases.<sup>7</sup> Further, an automatic presumption that anything above \$550 per-hour is “extreme or excessive” or unreasonable implicates various policy decisions that would be better addressed in a broader forum with larger stakeholder input.

As a general policy matter, SPS believes the Commission should be hesitant to adopt any RCE caps without further consideration of the wider implications, including the potential negative impacts. The Commission’s rate cases require specialized expertise on complex issues. Thus, the Commission, utilities, and other stakeholders benefit from the involvement of highly qualified attorneys and consultants. The reasonableness of those attorneys’ or consultants’ fees, whether above or below \$550 per-hour, should be reviewed and determined on a case-by-case basis.

Any policy that limits or restricts having a healthy bar before the Commission, or limits highly qualified, specialized experts to provide the Commission with information necessary to make informed decisions in these complex proceedings, should be avoided. There is not a *single* hourly rate that is the *only* reasonable rate under PURA and the RCE Rule—instead, there is a range of reasonableness for hourly rates depending on the circumstances, such as the nature of the rate case and the qualifications and experience of the specific attorneys or consultants.<sup>8</sup> Variations in hourly rates are due to different firms, lawyers, and consultants working in different rate cases

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<sup>5</sup> See generally 16 TAC § 25.245.

<sup>6</sup> 16 TAC § 25.245(c)(1).

<sup>7</sup> PURA § 36.061(b)(2).

<sup>8</sup> See Docket No. 51802, Anson Rebuttal at 7–20.

before this Commission, and normal changes in hourly rates over time (e.g., typical escalation), with the upper end of hourly rates charged in Texas electric rate proceedings in the \$600 to \$800-plus range.<sup>9</sup> Aside from this Commission’s rate cases, the Railroad Commission of Texas just recently found that hourly rates ranging as high as \$877 are reasonable and may be recovered from ratepayers by regulated gas utilities.<sup>10</sup> SPS believes the Commission should carefully consider the policy of imposing a \$550 hourly cap and the potential unintended, negative consequences.

***b. The PFD’s Reliance on the 2016 Office of Attorney General Memorandum is Misplaced.***

In this case and others, a 2016 memorandum from the Office of the Attorney General of Texas (“OAG”) has been referenced as support for the \$550 hourly cap. SPS also addressed the OAG memorandum in its pending rate case.<sup>11</sup> In the PFD in this proceeding, the ALJs state: “Today, however, and particularly in light of the OAG’s 2016 and 2019 memoranda on this topic, \$550 is the upper limit.”<sup>12</sup> As a preliminary matter, the OAG’s 2019 update of the 2016 memorandum only updated certain other unrelated guidance matters, without addressing the OAG’s 2016 dollar approval level.<sup>13</sup>

The PFD’s reliance on the OAG memorandum is misplaced. The memorandum does *not* actually impose an hourly rate cap, thus providing no reasonable basis for a \$550 hourly cap in rate cases. Instead, the memorandum allows for hourly rates in excess of \$525 with the express approval of the First Attorney General.<sup>14</sup> In other words, the OAG memorandum simply establishes a process for when, and when not, state agencies and educational bodies should seek hourly rate approval from the OAG.

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<sup>9</sup> See Docket No. 51802, Anson Rebuttal at 7–9.

<sup>10</sup> SPS notes that the law firm charging those hourly rates also routinely represent large electric utilities in rate cases and other proceedings before this Commission. *Statement of Intent Filed by Universal Natural Gas, Inc., to Increase and Consolidate Rates In the Unincorporated Areas Served by Universal Natural Gas, LLC, d/b/a Universal Natural Gas, Inc., Consumers Gas Company, LLC d/b/a Consumers Gas Company Inc., Enertex NB, LLC, and Gas Energy, LLC*, RRC Docket No. OS-20-00004865, Proposal for Decision at 22 (Mar. 31, 2021), Order (Apr. 14, 2021); *Statement of Intent Filed by Hooks Gas Pipeline, LLC to Increase and Consolidate Rates for Hooks Gas Pipeline, LLC, Texas Gas Pipeline Company, LLC, and 1486 Gas Pipeline, LLC*, RRC Docket No. OS-20-00004866, Proposal for Decision at 14 (Mar. 23, 2021), Order (Apr. 14, 2021).

<sup>11</sup> See Docket No. 51802, Anson Rebuttal at 15–17.

<sup>12</sup> PFD at 330.

<sup>13</sup> See Docket No. 51802, Anson Rebuttal at 15–16.

<sup>14</sup> See *id.* at 15.

Importantly, the dollar amount in the OAG memorandum (including the 2019 version) is from 2016. Attorney and consultant hourly rates, however, *escalate over time*.<sup>15</sup> The \$550 hourly cap correspondingly fails to take into account typical hourly rate increases year-over-year. Reliance on information that is stale in nature—aside from the dollar amount in the memorandum not even being an actual cap—is not a proper basis for imposing a cap on hourly rates in current circumstances. SPS believes that no weight should be given to the OAG memorandum in deciding this issue.

***c. If the Commission Adopts the PFD on the Hourly Cap Issue, It Should Refrain from Stating that the Cap has Across-the-Board Applicability.***

If the Commission is inclined in this proceeding to adopt the \$550 hourly cap with regard to SWEPCO's RCEs, SPS respectfully requests that the Commission's order refrain from stating that the cap has across-the-board applicability. Instead, the Commission's potential adoption of the cap should be based on the facts and circumstances of this proceeding and the specific evidence presented by SWEPCO and the other parties to this case. This appears to be generally consistent with the ALJ's recommendation in the PFD.

If the Commission goes beyond the ALJs' recommendation and states that the cap should be applied on a general basis, SPS is concerned that the Commission's order would effectively foreclose utilities in future cases from arguing that the hourly cap is inappropriate in light of their own evidence, facts, and circumstances. If a broader application is to be considered, SPS believes that issue should be addressed in a rulemaking where all interested stakeholders can participate and provide comment.

### **III. Conclusion**

SPS respectfully requests that the Commission consider this amicus curiae brief as it considers the \$550 hourly cap issue in the PFD.

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<sup>15</sup> *Id.* at 15–17.

Respectfully Submitted,

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